BEFORE THE
SURFACE TRANSPORTATION BOARD

229205

Docket No. EP 705

COMPETITION IN THE RAILROAD INDUSTRY

INITIAL COMMENTS OF CANADIAN PACIFIC RAILWAY COMPANY

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Table of Contents

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Canadian Pacific Railway Company and its U.S. subsidiaries, Soo Line Railroad Company ("SOO"), Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") and Delaware and Hudson Railway Company, Inc. ("D&H") (collectively "CP") submit these Initial Comments in response to the Notice served in the above-captioned proceeding on January 11, 2011 (the "*January 11 Notice*"). In the *January 11 Notice* (at 1), the Board announced its intention to "receive comments and hold a public hearing to explore the current state of competition in the railroad industry and possible policy alternatives to facilitate more competition, where appropriate."

The *January 11 Notice* (at 3) observed that:

> The United States railroad industry has changed in many significant ways since the Board's competitive access standards were originally adopted in the mid-1980's. Among the more salient developments have been the improving economic health of the railroad industry, increased consolidation in the Class I railroad sector, the proliferation of a short line railroad network, and an increased participation of rail customers in car ownership and maintenance .... Since 1980, railroad productivity improved dramatically, resulting in lower transportation rates. However, productivity gains appear to be diminishing and, since 2004, overall rail transportation prices have increased.

According to the Board, "[t]aken together, these events suggest that it is time for the Board to consider the issues of competition and access further." *Id.*

Neither the passage of time nor any developments affecting rail transportation in North America justify abandonment or modification of the competition policies that have governed the Board's regulatory oversight of the railroad industry in the post-Staggers era. As an initial matter, responsibility for establishing those policies lies in the first instance with Congress, not the STB. The competition-related regulations promulgated by the ICC and STB over the past 30 years are appropriately designed to carry out the policies articulated by Congress in the Staggers Act and the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). In those statutes, Congress mandated a balanced regulatory approach that gives carriers maximum freedom to develop prices and service offerings in response to market conditions, while providing for regulation only in those instances where government intervention is necessary to remedy abuses of market power. Congress has reaffirmed those policies, and effectively ratified the Board's regulatory approach, several times in the post-Staggers era. In the absence of a clear policy directive from Congress, any initiative by the Board to change its approach to railroad regulation by administrative fiat would be contrary to law.

More fundamentally, there is simply no factual predicate for abandoning a regulatory scheme that made it possible for railroads to recover from the financial crisis that plagued the industry prior to enactment of the Staggers Act. The deregulatory freedom afforded by the Staggers Act and ICCTA (and the ICC/STB's implementation of those statutes) was the critical ingredient in the revitalization of America's rail industry. That recovery has enabled railroads to deliver more efficient and reliable service and to invest hundreds of billions of dollars in private capital to create the capacity and facilities necessary to meet the growing demand for rail transportation in North America. As railroads are called upon to handle even greater volumes of freight traffic in the coming decades, any regulatory action that might hamper their ability to

attract capital to support further infrastructure investment would be manifestly contrary to the national interest.

Multiple studies of the state of competition in freight rail transportation – including the extensive *Christensen Report* commissioned by the STB – debunk the notion that tighter regulation of railroad prices and service is necessary to offset the exercise of "market power" by rail carriers.[1] To the contrary, the rebirth of the rail industry under policies set forth in the Staggers Act was accompanied by a twenty year decline in the inflation-adjusted rates that shippers pay for rail service. The upward movement in rail rates in the years immediately preceding the recent recession is not indicative of a "competition problem" requiring a regulatory solution. Rather, as the *Christensen Report* and other recent studies show, those price increases were the logical response to market conditions, including significant growth in demand, higher operating expenses and a slowing in the pace of productivity gains in the rail industry. In other words, recent changes in rail rates reflect the proper working of a competitive rail transportation market. Notwithstanding those increases, shippers continue to enjoy the benefits of rail service at prices that are significantly lower (in real terms) than the prices that prevailed prior to enactment of the Staggers Act.

For these reasons, the Board should reject proposals by one subset of shippers (those who are served exclusively by a single rail carrier) for a wholesale realignment of the regulatory balance established by Congress in the Staggers Act. Changing the Board's competitive access

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[1] *See* Laurits R. Christensen Associates, Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition, Revised Final Report* (2009) ("*2009 Christensen Report*"); Laurits R. Christensen Associates, Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition, Final Report* (2010) ("*2010 Christensen Report*"). The *2009 Christensen Report* and the *2010 Christensen Report* are referred to collectively herein as the "*Christensen Report.*"

regulations or expanding the circumstances under which shippers may challenge a segment of a through rate under the Board's *Bottleneck* decisions might, in the short-term, enable some shippers to obtain lower rates for their shipments. But the damage caused by adopting such policies – and, in particular, new regulations that curtail the ability of carriers to price their services differentially – would have serious adverse longer-term consequences, by undermining the rail industry's ability to attract the capital needed to maintain and expand the rail network. This would impair both the quality of rail service today and the capacity available to meet the needs of all shippers (including those who are exclusively served) in the future.

I. THE BOARD'S EXISTING REGULATORY APPROACH IS CONSISTENT WITH THE POLICIES SET FORTH BY CONGRESS IN THE STAGGERS ACT AND ICCTA, AND SHOULD BE RETAINED.

Over the last thirty years, the Board and its predecessor the ICC have developed and implemented competition-related rules based on the policies set forth in the Staggers Act and ICCTA. In enacting those statutes, Congress mandated a policy of reduced rail regulation and instructed the agency to limit government intervention to instances where such action was necessary to prevent abuses of market power. Congress also explicitly endorsed the principle of differential pricing and acknowledged that, in order for railroads to earn adequate revenues, they must be permitted to charge demand-inelastic shippers higher rates than shippers with access to more competitive options. The Board's existing policies, including the *Midtec* approach to competitive access and the *Bottleneck* decisions, are predicated on the regulatory balance struck by Congress in those seminal statutes.

One category of shippers (those who are served by one carrier) has advocated that the Board change its competition rules, apparently because those shippers believe that they might obtain lower rail rates under a different regulatory approach. For the reasons detailed below,

there is no justification for the Board to alter its competition-related policies – to the contrary, changing those rules would be both contrary to law and deeply harmful to the national interest.

As an initial matter, the Board does not have the authority to alter or ignore Congressional policy. The Board's jurisdiction to regulate railroads derives from the Interstate Commerce Act (as modified by ICCTA). The Board's current regulatory policies can be replaced only if Congress chooses to alter the statutory framework upon which those policies are founded. The *January 11 Notice* appears to acknowledge this limitation on the Board's power to initiate fundamental changes in regulatory policy. *See January 11 Notice* at 6 (requesting comment as to "whether there are statutory constraints on the Board's ability to change policy at this time").

Indeed, the Board has repeatedly taken the position before Congress that any change to its competitive access rules would require legislative action:

> The differences between the railroads and the shippers on the Board's competitive access rules are fundamental, and they raise basic policy issues—concerning the appropriate role of competition, differential pricing, and how railroads earn revenues and structure their services—that are more appropriately resolved by Congress than by an administrative agency.[2]

In 2001, then-STB Chairman Morgan testified that "legislation would be required" in order to permit "more open access that, unlike the current law, would not require a threshold showing that the serving carrier acted in an anticompetitive way."[3] Likewise, Chairman Morgan told a

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[2] *See* Letter from L. Morgan to Sens. J. McCain & K. Bailey Hutchinson, at 4 (Dec. 21, 1998).

[3] *Oversight Hearing on the Surface Transportation Board: Hearing Before the Subcomm. On Surface Transp. and Merchant Marine of the Senate Commerce Comm.*, 107th Cong., at 7 (Mar. 21, 2001).

Senate subcommittee in 2002 that Board-initiated changes to the *Bottleneck* and competitive access rules "would not be consistent with current law."[4]

The Board's recognition that Congressional action is required to alter competition policy with respect to the rail industry is firmly based in the statute, including the Rail Transportation Policy ("RTP") set forth at 49 U.S.C. § 10101. The RTP contains several provisions relevant to the Board's authority to regulate rates, including the following:

> In regulating the railroad industry, it is the policy of the United States Government—
>
> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
>
> (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board; . . . . [and]
>
> (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital.

The RTP expressly commands the Board to limit its regulatory control over rates and to otherwise adopt rules that enable railroads to earn revenues in "the amount necessary to maintain

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[4] *Railroad Shipper Concerns: Hearing Before the Subcomm. On Surface Transp. and Merchant Marine of the Senate Commerce Comm.*, 107th Cong., at 10 (July 31, 2001); *see also The Surface Transportation Board's New Merger Rules: Hearing Before the Subcomm. On Surface Transp. and Merchant Marine of the Senate Commerce Comm.*, 107th Cong., at 21 (June 28, 2001) (testimony of STB Chairman Morgan) (Board could not "undo" *Bottleneck* decision because decision "was based on the statute") (emphasis added); *id.* at 67, 71-72 (*Midtec* requirement that shippers show abuse of market power before STB can order competitive access must be maintained because "the Staggers Rail Act of 1980 was not an open access law") (emphasis added).

the rail system and to attract capital." 49 U.S.C. § 10101(6). The RTP is based upon three key provisions of the Staggers Act that have informed the Board's competition-related rules.

First, the Staggers Act explicitly endorsed differential pricing in the railroad industry. Many of the parties who have called for the STB to liberalize its competitive access rules predicate their requests on the assertion that rates for exclusively-served shippers are "too high," and that the prices they pay would be lower if the Board made it easier to force railroads to grant terminal access, provide switching services or quote "bottleneck" rates. But the notion that there is something improper about a shipper served by only one railroad paying demand-based rates that are relatively higher than rates paid by a shipper with access to more than one railroad is fundamentally at odds with Congress's unequivocal policy choice to permit railroads to price their services differentially:

> Because of the existence of competition, all rates cannot pay an equal percentage of "fixed costs." As in other industries, some rates will contribute more to fixed costs than others. The Committee understands the necessity of such differential pricing, and has designed a regulatory system which allows for such pricing decisions. In the absence of the regulatory flexibility which permits differential pricing, all shippers would be harmed. If traffic which moved at low rates were forced to pay higher rates, the traffic would disappear to other modes. When the traffic moved to another mode, the contribution to fixed cost made by that traffic would also disappear. The result is that the remaining commodities would have to make up for the fixed cost formerly paid by the traffic which moved to another mode, resulting in higher rates for the remaining traffic.[5]

Both the Board and the courts have recognized that demand-based differential pricing is a "core regulatory principle" of the Staggers Act. *See, e.g., Major Issues in Rail Rate Cases*, STB Ex Parte 657 (Sub-No. 1) (Oct. 30, 2006) at 20 (demand-based differential pricing is a "core

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[5] H.R. REP. NO. 96-1035, at 39-40 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3978, 3984-85 (emphasis added).

regulatory principle" that "follow[s] the directive from Congress in the Staggers Rail Act of 1980"); *see also Union Pac. R.R. Co. v. STB*, 628 F.3d 597, 600 (D.C. Cir. 2010) ("By statute, railroads are authorized to engage in a certain amount of demand-based differential pricing in order to earn 'adequate revenues'"); *Duke Energy Corp. v. Norfolk So. Ry. Co.*, 7 S.T.B. 89, 95 (2003) ("Under the Staggers Rail Act of 1980, railroads were given considerable freedom to employ demand-based differential pricing."). A necessary corollary of differential pricing is that customers served by a single railroad will pay more than those who have the ability to shift their business to other carriers or modes of transportation. As Congress observed, permitting differential pricing is ultimately in the best interest of all shippers, because such a policy is necessary to enable railroads to earn revenues sufficient to support adequate service and needed capital investment.[6]

Second, the 4R Act and the Staggers Act "ended the former shipper-directed 'open routing' system under which railroads had been required to establish extensive and not always efficient interchanges and through routes." *Review of Rail Access and Competition Issues*, 3 S.T.B. 92, 97-98 (1998). The replacement of this "open access" system with one under which access and access pricing are left to voluntary agreements, and regulatory prescription of rates and routes is limited to instances of abuse of market power, is a cornerstone of Staggers Act reform. *Id.* at 97 ("[T]he statute does not provide these access remedies on demand; a showing of need is required."). Calls for the Board to require rail carriers to grant "open access" upon request are utterly inconsistent with the policy articulated in the Staggers Act.

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[6] *See also The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, STB Ex Parte No. 658, Hr'g Tr. at 16 (Oct. 19, 2005) (testimony of USDOT noting that "[c]aptive shippers overall are better off" under Staggers' differential pricing regime "because they do not have to bear the entire fixed costs of rail networks").

Third, and perhaps most importantly, the Staggers Act mandates that rail regulation generally be limited to remedying demonstrated abuses of market power. The Conference Report on the Staggers Act stated that Congress "expects" that "the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power." H.R. CONF. REP. NO. 96-1430, at 105 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4110, 4137 (emphasis added). The ICC's determination that it should not prescribe forced access absent proof that a carrier has acted in an anticompetitive manner is fully consistent with Congress's statements regarding what the agency's regulatory approach should be.

While certain individual members of Congress have, from time to time, expressed dissatisfaction with the Staggers Act and have introduced bills to amend the statute, those legislators are a decided minority.[7] Congress has reiterated on many occasions its approval of the regulatory balance struck by the Staggers Act and the competition-related policies adopted by the Board pursuant to that statute. Indeed, Congress has effectively ratified the *Midtec* and *Bottleneck* decisions by repeatedly rejecting legislative proposals that would have had the effect of altering those decisions. *See infra* at pp. 50-52. The bipartisan leadership of the House Committee on Transportation and Infrastructure and the Subcommittee on Railroads, Pipelines, and Hazardous Materials recently admonished the Board to "maintain[] the existing regulatory balance between the railroads and shippers." *See* Letter of J. Mica *et al.* to D. Elliott at 1 (Jan. 24, 2011).

In short, many of the supposed "problems" that parties cite as justifications for revamping the Board's competitive access and *Bottleneck* rules – including railroads' assessment of higher

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[7] *See* 146 CONG. REC. S9891 (daily ed. Oct. 5, 2000) (statement of Sen. Rockefeller) ("When the Staggers Act was passed to deregulate the railroads, *which unfortunately this Congress did in 1980*, they divided it into two parts.") (emphasis added).

rates on less demand-elastic traffic and the elimination of less efficient routes – are a direct result of the policy choices that Congress made in the Staggers Act. That legislation has been widely recognized as a "stroke of genius" that "allowed the revitalization of a previously deeply troubled U.S. railroad industry by removing many of the shackles of overregulation." *Rail Transp. of Grain*, STB Ex Parte No. 665 (Jan. 14, 2008) (comments of Comm'r Buttrey). The Board,[8] Congress,[9] the Government Accounting Office (now known as the Government Accountability Office ("GAO"))[10] and USDOT[11] all have lauded the wisdom of the policies embodied in the Staggers Act and the success of those policies in revitalizing the nation's railroads. As the Board observed,

> The Staggers Act granted railroads freedom from an overly restrictive and burdensome regulatory regime, enabling them to compete more effectively with each other and with other transportation modes, most notably motor carriers and barge lines. . . . The competitive process unleashed by the Staggers Act has been one of the most significant public policy successes of this century.[12]

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[8] *See, e.g., Review of Rail Access and Competition Issues*, 3 S.T.B. 92, 92 (1998) ("There is no dispute that the Staggers Rail Act of 1980 . . . as implemented and administered first by the Interstate Commerce Commission . . . and now by the Board, has revitalized American railroads.").

[9] *See, e.g.*, H. REP. NO. 104-311, at 91 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 803 ("The Staggers era has produced a renaissance in the railroad industry.").

[10] U.S. GOV'T ACCOUNTING OFFICE, GAO/RCED-90-80, *RAILROAD REGULATION: ECONOMIC AND FINANCIAL IMPACTS OF THE STAGGERS RAIL ACT OF 1980* 3-4 (May 1990) (finding that the Staggers Act made railroads "more competitive" and that "[s]hippers have benefited from reduced railroad regulation").

[11] *See The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, STB Ex Parte No. 658, Hr'g Tr. at 14-15 (Oct. 19, 2005) (testimony of USDOT) ("The Department of Transportation considers the Act a resounding success. We do so because in sum the statute did what it was designed to do. It revitalized the railroad industry and by so doing benefitted shippers and consumers throughout the economy.")

[12] *Union Pac. Corp. – Control and Merger – S. Pac. Corp.*, 1 S.T.B. 233, 384 (1996) (emphasis added).

It is not now and never has been the role of an administrative agency to set policy based on its own judgment as to what an ideal regulatory scheme should be. Rather, the STB (like other administrative agencies) is tasked with the responsibility to implement the statutes enacted by Congress. If certain stakeholders believe that the nation's transportation policy should be altered for their benefit, the appropriate forum for seeking such change is Congress, not this Board.

II. THERE EXISTS NO FACTUAL PREDICATE TO SUPPORT WHOLESALE REGULATORY CHANGE.

Even if the Board had the statutory authority to alter its competition-related policies – and it does not – there is no justification for the Board to do so. The remarkable success of the Staggers Act in revitalizing the rail industry confirms the wisdom of the policies embodied in that statute, and is certainly not a reason for the Board to consider changing them today.

Claims that regulatory change is necessary to remedy a reduction in competition in the post-Staggers era are simply not supported by the facts. The rail industry is more competitive today than it was in 1980 – the Staggers Act created healthier railroads characterized by improved productivity, better service and rates that remain significantly lower (on a real-dollar basis) than they were in 1980. Multiple studies confirm that competition is alive and well in the rail industry. Nor is there any merit to shipper claims that Board-approved mergers significantly diminished competition – to the contrary, the consolidation of the industry generated substantial pro-competitive benefits, while conditions imposed by the Board assured that not a single shipper became "captive" as the result of a Board-approved merger. Similarly, claims by some shippers that the upward movement in rail rates during the 2004-2008 period reflects an absence of effective competition are not supported by the facts.

A. Studies Have Consistently Shown That The Transportation Markets In Which Railroads Do Business Are Competitive.

The success of the competition policies established in the Staggers Act is confirmed by several recent studies, which demonstrate that today's rail transportation marketplace is highly competitive. Studies conducted by GAO, FRA and the Board itself all found that the post-Staggers regulatory landscape has promoted vigorous competition and improved service, thereby benefiting railroads, shippers and other stakeholders.

Among the major benefits of the Staggers Act for shippers has been a significant decline in real railroad rates. A 2006 GAO report found that rail rates declined across the freight railroad industry following enactment of the Staggers Act.[13] The GAO further found that the degree of shipper "captivity" actually decreased between 1994 and 2004, noting that:

> [i]n 2004, origin and destination routes with access to only one Class I railroad carried 12 percent of industry revenue and 10 percent of industry tonnage, which represents a decline from 1994, when 22 percent of industry revenue and 21 percent of industry tonnage moved on routes served by one Class I railroad.

Id. at 27-28. According to GAO, this evidence "suggests that more railroad traffic is traveling on routes with access to more than one Class I railroad." *Id.* at 28.

GAO's findings regarding the impact of the Staggers Act on railroad rate levels are consistent with analyses conducted by the Board itself. The STB maintains a rail rate index that tracks changes in Class I railroad rates.[14] In 1998, the STB found that, between 1982 and 1996,

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[13] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-94, FREIGHT RAILROADS: INDUSTRY HEALTH HAS IMPROVED, BUT CONCERNS ABOUT COMPETITION AND CAPACITY SHOULD BE ADDRESSED 11 (2006).

[14] Surface Transp. Bd., *Rail Rates Continue Multi-Year Decline*, at 1 (Feb. 1998), *available at* http://www.stb.dot.gov/stb/docs/Rate_Index_96.pdf.

the rail rate index declined by 46.4% in real dollars.[15] In a more recent analysis, the STB found that average rates had declined by 34.5% between 1985 and 2007.[16] The U.S. Department of Transportation has also observed that shippers have benefited from "lower average rates" in the years since passage of the Staggers Act.[17]

Based upon its findings, GAO concluded that the Staggers Act strikes an appropriate balance between the objectives of promoting a financially sound rail industry and protecting shippers against abuses of market power:

> The Staggers Rail Act achieved far-ranging benefits in helping to create and sustain a healthy and vibrant freight railroad industry, as well as an efficient rail transportation system that supports the important role freight plays in the nation's economy. Critical to the Staggers Rail Act was the concept of balance—on one hand, the act sought to allow rail carriers to earn adequate revenues so that they could meet their current and future capital needs. On the other hand, the act recognized the need for a remnant regulatory regime that would maintain reasonable rates and prohibit undue concentrations of market power in areas where no effective competition existed. The act recognized that it was vital for the federal government to promote competition and rely on it to set rates. Without a doubt, rates have decreased for most shippers, and most shippers are better off in the post-Staggers environment than they were previously. This outcome suggests that widespread and fundamental changes to the relationship between the railroads and their customers are not needed.

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[15] *Id.* at 3. Indeed, during that period, rail rates declined across 15 different commodity groups by as much as 55.7%. *Id.* at 6.

[16] Surface Transp. Bd., *Study of Railroad Rates: 1985-1987*, at 2 (Jan. 15, 2009), *available at* http://www.stb.dot.gov/stb/industry/1985-2007RailroadRateStudy.pdf.

[17] STAFF OF COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, THE CURRENT FINANCIAL STATE OF THE CLASS I FREIGHT RAIL INDUSTRY 4 (Sept. 15, 2010) *available at* http://www.mgfa.org/userfiles/file/Railroad%20Financial%20Report%209_15_10.pdf (quoting Department of Transportation Under Secretary for Policy Jeffrey Shane).

Id. at 64-5 (emphasis added). GAO did suggest that the STB perform a follow-up study of competition in the rail industry and examine the processes for rate relief available to captive shippers. *Id.* at 38.[18]

While the STB questioned the need for the follow-up analysis suggested by GAO (*id.* at 79-80), the Board subsequently engaged Christensen Associates to analyze the state of competition in the railroad industry. Like GAO, Christensen Associates concluded that both railroads and their customers benefitted from deregulation: "[F]ollowing the passage of The Staggers Act, the railroad industry experienced dramatic reductions in costs and increased productivity, which yielded higher returns for carriers and lower inflation-adjusted rates for shippers." *2009 Christensen Report* at ES-1. More importantly, the *Christensen Report* found that "[t]he recent increases in revenue per ton-mile appear to be largely the result of increases in fixed and marginal costs—related to increases in the railroad industry's input prices and diminishing productivity growth—and not due to an increased exercise of market power." *See 2010 Christensen Report* at 4-13, 5-20, 6-3, 6-17; *see also 2009 Christensen Report* at ES-38. The fact that average rail rates declined once again in 2009 further demonstrates that rate increases during the 2004-2008 period were not the product of railroad market power. *See 2010 Christensen Report* at i, 2-5.

In 2009, FRA issued its Preliminary National Rail Plan. Like other observers, FRA found that the Staggers Act has produced improved rail infrastructure, increased carrier

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[18] In recent years, the Board has taken significant action to address concerns about the accessibility of the Board's processes, including adopting new simplified standards for smaller rate reasonableness cases (*see Simplified Standards for Rail Rate Cases*, Ex Parte 646 (Sub-No. 1) (served Sept. 5, 2007)), substantially reducing filing fees for complaints (*see Regulations Governing Fees for Services*, Ex Parte 542 (Sub-No. 18) (served Feb. 15, 2011)) and actively engaging with shippers and railroads to mediate disputes and resolve shipper concerns without the need to resort to litigation.

competitiveness and lower rates for shippers.[19] FRA's analysis concluded that the increase in rail rates in the mid-2000s was not the product of increased market power, but rather "can be attributed to a booming economy that placed capacity constraints on the transportation network [and to] rising fuel prices." *Id.* at 17. FRA emphasized the importance of "Federal legislation and policies that allow rail carriers to earn revenues sufficient to encourage further investment in the rail system" in order to provide for necessary "infrastructure maintenance and capacity enhancements." *Id.* at 4.

GAO, Christensen Associates, and FRA all arrived at the same conclusion: the policies embodied in the Staggers Act have promoted improved conditions in the rail industry and have resulted in shippers paying significantly lower inflation-adjusted rates than they did prior to 1980. Moreover, those studies unanimously concluded that the rise in average rail rates beginning in 2004 was attributable to factors such as declining productivity and higher input costs, not an absence of effective rail competition. At the same time, railroads have been able to improve their physical plant and to invest billions of dollars in added capacity to meet the requirements of their customers. These findings strongly support continuation of the regulatory policies adopted by the ICC/STB in implementing the Staggers Act. Imposing burdensome new regulations for the benefit of a limited group of "captive" shippers would threaten the ability of rail carriers to invest in the infrastructure, facilities and personnel that will be needed both to maintain the existing rail network and to accommodate anticipated future growth in the demand for rail service in North America.

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[19] FED. R.R. ADM'R, PRELIMINARY NATIONAL RAIL PLAN: THE GROUNDWORK FOR DEVELOPING POLICIES TO IMPROVE THE UNITED STATES TRANSPORTATION SYSTEM 21 (Oct. 2009) (finding that since the Staggers Act, railroads have improved their infrastructure and that "[r]ail rates are lower today than in 1980, when compared in constant dollars").

B. The Emergence Of A Global Economy Has Introduced Substantial New Sources Of Product And Geographic Competition For Rail Carriers And Their Customers.

The world is a far more competitive place than it was in 1980. Global shifts in manufacturing capacity and income growth in developing countries have created a highly interdependent and competitive global economy. The emergence of this global economy has introduced substantial new sources of product and geographic competition for railroads, other transportation providers and their customers. In an environment where North American businesses have increasing opportunities to participate in end markets across the globe (while facing greater challenges from foreign competitors), railroads must offer attractive rate and service packages if they are to maintain and grow their traffic.

United States exports of two staple rail commodities – grain and coal – have increased substantially over the past decade. Shipments of export grain from U.S. origins to Asian end markets are an increasingly important business segment for CP and other railroads.[20] The demand for U.S. grain in export markets is growing rapidly. For example, in 2010, China purchased 60 million bushels of corn from the United States, a significant increase over earlier periods.[21] According to the U.S. Department of Agriculture:

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[20] While CP does not have a single-line rail route from the Upper Midwest to export terminals in the Pacific Northwest, CP has competed successfully for a share of U.S. export grain shipments via an interline route involving CP's Canadian lines and an interchange with UP at Kingsgate, WA.

[21] *See* U.S. Grains Council, *Global Update: Officers Mission Participants Talk US Corn, DDGS in China* (Feb. 3, 2011), *available at* http://www.grains.org/images/stories/globalUpdates_media/2011/USGC_Global_Update_2-3-11.pdf.

> The United States exports nearly one-quarter of the grain it produces. On average, this includes about 45 percent of U.S.-grown wheat, 35 percent of U.S.-grown soybeans, and 20 percent of the U.S.-grown corn. More than 50 percent of the U.S. grains and oilseeds exports are shipped to Asia—mainly Japan and China. Japan is the largest importer of U.S. corn. During 2010, 22 million metric tons (mmt) of grain and oilseeds were exported to Japan. Over 15 mmt of corn were exported to Japan, representing about 18 percent of the total U.S. grain and oilseeds exports and 29 percent of the corn exports. On the other hand, China is the largest importer of the U.S. soybeans, importing a total of 24.34 mmt during 2010—about 21 percent of the total U.S. grain and oilseed exports and 58 percent of the soybean exports.[22]

As of January 2011 "[t]he year-to-date total [the year being calculated as the 2010/11 marketing year that ends on August 31] soybean export sales to China currently total 26.2 mmt, 16.7 percent higher than in 2009/10. In addition, during the week ending January 13, unshipped export balances for corn, wheat, and soybeans are 25.6 percent higher than last year at this time."[23]

The rising global demand for North America's farm products has sharply increased competition for grain shipments. Grain producers today can choose from among a much wider variety of domestic and foreign end markets. The ability of U.S. grain producers to access export markets provides a significant constraint on rail rates for shipments to domestic points of consumption. The emergence of ethanol as an alternative fuel has likewise created new opportunities for Midwestern farmers to sell their crops locally to biofuel plants - such short-distance movements are highly truck competitive. In this environment, railroads must be competitive on both price and service or risk losing business. CP is investing $100 million to

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[22] U.S. DEP'T OF AGRICULTURE, *Exports to Asia: Ocean Freight Rates and Spread Influence Port Choice and Vessel Sizes*, GRAIN TRANSPORTATION REPORT (Feb. 24, 2011), *available at* http://www.ams.usda.gov/AMSv1.0/GTR.

[23] U.S. DEP'T OF AGRICULTURE, GRAIN TRANSPORTATION REPORT (Jan. 27, 2011), *available at* http://www.ams.usda.gov/AMSv1.0/GTR.

upgrade its North Dakota lines, in large part to enhance network capacity and improve service for U.S. grain traffic.[24]

A similar story can be told for coal. Growing demand overseas has opened up new export markets for North American coal. In 2009 China's imports of coking coal from worldwide sources jumped to 39 million tons from only 2 million tons in 2008.[25] The value of U.S. coal exports to Asia has increased twentyfold to raise the region's share of total coal exports from 6 percent in 2001 to 22 percent in 2010. Railroads have responded to the growth in export demand by developing new routing options for shippers. Exports of Powder River Basin coal to Asia have begun to move via the Canadian ports of Vancouver and Prince Rupert, BC. Increasing volumes of U.S. coal are also being exported from traditional coal export terminals on the U.S. East Coast. The proliferation of global end markets, rail routings and terminal options has increased the competitive alternatives available to U.S. coal producers.

Xcoal Energy & Resources, which plans to export 11 million tons of coal from eastern terminals in 2011, has filed comments strongly opposing changes to the Board's existing competition policies. *See* Comments of Xcoal Energy & Resources, STB Ex Parte No. 705 (Mar. 25, 2011). In its Comments, Xcoal expresses concern that changes in regulation for the benefit of some shippers might negatively impact rail service to Eastern coal fields and, in turn, threaten further growth in coal exports. Such a result would be directly contrary to the Administration's stated objective of doubling U.S. exports by the year 2014. *See* President

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[24] *See* Canadian Pacific, *CP invests in North Dakota, expanding capabilities and resources*, (Mar. 25, 2011), *available at* http://www8.cpr.ca/cms/English/Media/News/General/2010/cp+invests+in+north+dakota.htm

[25] *See* U.S. ENERGY INFO. ADMIN., *U.S. Exports of Coking Coal Were Nearly Triple U.S. Consumption in 2010* (Feb. 16, 2011), *available at* http://www.eia.doe.gov/todayinenergy/detail.cfm?id=150.

Barak Obama, State of the Union Address (Jan. 25, 2011) ("To help businesses sell more products abroad, we set a goal of doubling our exports by 2014 – because the more we export, the more jobs we create here at home.")

Increasing competition from foreign manufacturers for products consumed in the United States has likewise created a heightened level of competition between supply chains for the movement of goods imported into North America. Between 1997 and 2007, U.S. international container handlings increased 6.2 percent per year, or more than twice the rate of overall economic growth. Container growth was even stronger for Canada (7.7 percent per year) and Mexico (13.0 percent per year) during that period.

Competition for the transportation of import/export container shipments is intense. CP and other rail carriers are but one link in the global supply chains via which those shipments move. Numerous combinations of ocean carriers, ports, inland transportation modes and railroads offer a plethora of competitive alternatives for import containers arriving on both the East and West Coasts of North America. CP faces intense competition for international container freight from a variety of sources, including other railroads, motor carriers, competing intermodal terminals at the ports it serves, and water-rail routes via alternate ports.

In the West, CP provides intermodal service to and from the U.S. Midwest via the Port of Vancouver. Competitive options available for such movements include CN rail service via both Vancouver and Prince Rupert, BC, as well as alternative water and rail carrier services operating between the Midwest and the ports of Seattle/Tacoma and Los Angeles/Long Beach. In the East, CP intermodal service between the Port of Montreal and the U.S. Midwest competes with efficient service offerings from CN (via Halifax and Montreal) and both Norfolk Southern and CSXT (via New York/New Jersey, Philadelphia, Baltimore and other East Coast ports). Water

routings via East Coast ports also compete with CP's Vancouver service offering for shipments to and from Asia. The percentage of container traffic between Northeast Asia and U.S. East Coast ports that moves via the Panama Canal has tripled over the past decade. The Panama Canal expansion project, which is slated for completion in 2014, will further enhance the competitiveness of container routings via East Coast ports.[26]

This agency has acknowledged the important role of inland rail transportation in America's participation in global markets. For example, in approving the Burlington Northern and Santa Fe merger, the ICC noted that "U.S. railroads have a major role to play in increasing trade with other countries . . ." *Burlington Northern, Inc. et al.—Control & Merger—Santa Fe Pac. Corp. et al.*, 10 I.C.C.2d 661 (Aug. 23, 1995). Railroads must offer both competitive pricing and efficient, reliable service in order to succeed in the intensely competitive global transportation marketplace. In the coming decades, carriers will need to invest billions of dollars to increase the capacity of their rail lines and terminal facilities in order to keep pace with the anticipated growth in import/export traffic. Regulatory policies that impair the ability of railroads to attract capital will not only endanger the economic health of the rail industry, but will thwart the efforts of American business to participate successfully in global markets.

C. Post-Staggers Rail Consolidations Did Not Substantially Reduce Rail Competition.

The *January 11 Notice* (at 3) identifies "increased consolidation in the Class I railroad sector" as one of the factors motivating the Board's decision to re-evaluate its competition and access policies. As an initial matter, there has not been any consolidation among the Class I

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[26] *See* Jean-Paul Rodrigue, Van Horne Institute, *Factors Impacting N. American Freight Distribution in View of the Panama Canal Expansion* 34 (2010) ("East and Gulf coast ports see the expansion of the Panama Canal as an opportunity to increase cargo volumes and gather a greater share of the transpacific trade") (emphasis in original).

railroads for more than a decade. There are seven Class I rail carriers today – the same number that existed after the Board approved the Conrail acquisition in 1998 and the CN/IC merger in 1999. Both of those transactions were proposed before the Board's 1998 comprehensive review of its competition and access policies, in which the agency concluded that continuation of its post-Staggers policies was appropriate. *See Review of Rail Access and Competition Issues*, 3 S.T.B. 92 (1998). And the Board's more recent examinations of competition issues have all occurred in the context of a marketplace with seven Class I carriers.[27] As a result, "consolidation in the Class I railroad sector" is not a recent phenomenon that might warrant reconsideration of the Board's competition policies.

Moreover, every major consolidation approved by the ICC/STB in the post-Staggers era was authorized on the basis of findings that, on balance, the transaction (as conditioned) was pro-competitive. No shipper has been rendered "captive" to a single carrier as a consequence of a post-Staggers rail merger. The ICC/STB has consistently used its conditioning power to mitigate any perceived anticompetitive effects that a consolidation might have on individual shippers, while recognizing that consolidations can generate significant pro-competitive benefits, both by creating efficient new single-line services and by enabling cost reductions that can be passed along to shippers. Contrary to the assertions of some shippers, the ICC's (and STB's) implementation of the merger statute (49 U.S.C. § 11323 *et seq.*) has helped to create a transportation marketplace that is more competitive today than it was in a pre-Staggers era characterized by a balkanized rail network, financially struggling carriers, and excessive regulation that stifled growth and investment.

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[27] *See, e.g., Policy Alternatives to Increase Competition in the Railroad Industry*, STB Ex Parte No. 688 (Apr. 14, 2009); *Study of Competition in the Freight Railroad Industry*, STB Ex Parte No. 680 (Nov. 6, 2008).

Consolidation among Class I carriers has not created a larger class of "captive" rail shippers. As a matter of policy, the Board and the ICC before it have imposed conditions to prevent any merger from reducing a shipper's rail options from two railroads to one:

> Since 1980 at least, we have consistently imposed merger conditions to preserve two-railroad service where it existed, and we have imposed remedies to preserve competition where the number of carriers serving a shipper has gone from three to two in limited circumstances on a case-by-case basis. The overall result, so far, has been that railroads have continued to face effective competition, either from other railroads or other modes, that has forced them to pass on the preponderance of the significant efficiency gains that they have achieved (through mergers and other means) to the shippers that they serve.

Major Rail Consolidation Procedures, 5 S.T.B. 539, 548-49 (2001) (emphasis added).[28]

While some rail shippers are served by only one carrier today, that circumstance is, in most cases, the result of longstanding geographic conditions, not the consequence of a merger. As the Board has observed, the "structure of the rail industry was created by the marketplace, not by recent mergers or by ICC or STB regulation." *Id.* at 548. The ICC/STB's exercise of its conditioning power in connection with consolidations between Class I carriers effectively prevented those transactions from generating significant anticompetitive effects.

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[28] *See also Canadian Pacific Ry. Co.—Control—Dakota, Minnesota & Eastern Ry. Corp.*, STB Fin. Dkt. No. 35081, at 9 (Sept. 28, 2008) ("No shipper will lose the option of competitive rail service as a direct result of this merger."); *Kansas City Southern—Control—The Kansas City Southern Ry. Co., et al.*, 7 S.T.B. 933, 948 (2004) ("[T]here will not be a reduction in the number of carriers serving any shippers on the KCS/TM system."); *Dakota, Minnesota & Eastern R.R. Corp. et al.—Control—Iowa, Chicago & Eastern R.R. Corp.*, 6 S.T.B. 511, 524 (2003) ("[C]ommon control will not result in any reduction in existing rail-to-rail competition at any point or in any market"); *CSX Corp. et al.—Control—Conrail Inc. et al.*, 3 S.T.B. 196, 248 (1998) (in "handful" of instances where restructuring would result in reduction of carriers serving a particular location from two to one, Board imposed trackage rights and other conditions to ensure continued rail-to-rail competition).

At the same time, the Board and the ICC before it have consistently found that the mergers they approved would help to enhance competition, not only between rail carriers, but also with other modes of transportation. One of the most significant Class I consolidations to be approved by the Board was the joint acquisition of Conrail by Norfolk Southern and CSXT. The Conrail transaction was decidedly pro-competitive, as it restored two-railroad competition for hundreds of shippers that had previously been served only by Conrail. The Board found that the Conrail transaction would "significantly increase competition for many shippers [and that] the clear impact of this transaction is to create a substantial increase in rail-to-rail competition, not a reduction." *Conrail*, 3 S.T.B. at 248 (emphasis added).

Other mergers approved by the ICC/STB in the post-Staggers era enhanced competition by preserving rail service that otherwise would have been lost due to the financial collapse or bankruptcy of a railroad. For example, CP's acquisition of the bankrupt Delaware & Hudson Railway ("D&H") prevented the cessation of service by a bankrupt carrier and enabled D&H to continue its role as a competitive option to Conrail in the northeastern United States. *Canadian Pac. Ltd., et al.—Purchase & Trackage Rights—Delaware & Hudson Ry. Co.*, 7 I.C.C.2d 95 (1990). Indeed, the ICC found that CP's purchase of D&H would allow it "to offer service significantly more competitive than that which [it had been] able to provide." *Id.* The acquisition of the core rail assets of the former Milwaukee Road by CP's U.S. subsidiary, Soo Line Railroad Company, in 1985 likewise preserved service over thousands of miles of rail lines that were threatened with extinction by the collapse of the Milwaukee Road.[29]

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[29] *See Chicago, Milwaukee, St. Paul & Pac. R.R. Co. – Reorganization – Acquisition by Grand Trunk Corp.*, 2 I.C.C. 161 (1984), 2 I.C.C. 2d 427 (1985).

Many of the post-Staggers mergers approved by the Board were primarily end-to-end in nature. Those transactions enabled carriers to offer expanded single-line service and to achieve substantial reductions in overhead and other fixed costs without reducing the competitive options available to shippers. The Board has consistently found that such consolidations generate substantial "public" benefits for shippers.

For example, in approving the UP-SP merger, the Board observed:

> As has been true for the nation's rail system as a whole since the Staggers Act, competitive pressures have been sufficient to spur railroads to enhance productivity by adopting efficient operating and management systems, and their costs have gone down each year because of significant productivity gains. Competitive pressures have ensured that the preponderance of those gains have been passed along to shippers in the form of lower rates and better and more responsive service."

Union Pac. Corp.—Control and Merger –S. Pac. Corp., 1 S.T.B. 233, 386 (1996) (emphasis added). Likewise, in authorizing the BN-Santa Fe consolidation, the Board found that:

> The primarily end-to-end (vertical) integration of the rail operations conducted by BN and Santa Fe will enable the consolidated carrier to reduce the costs it incurs and to improve the services it provides. Shippers should benefit from lower rates and improved service. . . . The record indicates that the consolidation of BN and Santa Fe will result in annual cost savings . . . mostly from efficiencies that can be realized only through consolidation. . . . The savings in overhead and support functions will be achieved by operating the combined company with unified executive offices, an integrated and consolidated management information system, and a centralized customer support function and just-in-time inventory practices.

Burlington Northern Inc. et al.,--Control and Merger—Santa Fe Pacific Corp. et al., 10 I.C.C.2d 661 (1995); *see also Kansas City Southern—Control—The Kansas City Southern Ry. Co., et al.*, 7. S.T.B. 933, 949 (2004) ("KCS/TM will be able to achieve important cost-saving benefits without a wholesale restructuring of rail facilities. The evidence also demonstrates that customers of both KCS and TM will benefit from increased reliability and other service

improvements and operating efficiencies fostered by the transaction."); *Canadian Nat'l Ry. Co. et al.—Control—Illinois Cent. Corp. et al.*, 4 S.T.B. 122, 144 (May 21, 1999) (finding that the transaction would "make possible significant improved single-line service for many shippers, and will result in merger synergies that should allow the carriers to provide service at lower cost").

The Board's more recent decision approving CP's acquisition of DM&E and IC&E likewise found that that end-to-end transaction would strengthen competition and produce substantial benefits for shippers:

> The evidence demonstrates that this essentially end-to-end transaction will benefit shippers by enabling CPRC/DM&E/IC&E to provide single-system service where none currently exists. In addition to the benefit to the applicants of being able to compete more efficiently against rail competitors (as well as motor carriage and barge competition), shippers on the CPRC/DM&E/IC&E system should benefit from better equipment coordination and utilization, improved service patterns, enhanced resources for safety upgrades, and other operating efficiencies made possible by common control. Common control should also give shippers on CPRC, DM&E, and IC&E new routing and service options and more efficient and competitive single-system access to significant new markets and gateways.

Canadian Pac. Ry. Co.—Control—Dakota, Minnesota & Eastern Ry. Corp., STB Fin. Dkt. No. 35081, at 11 (Sept 30, 2008) (emphasis added).

In short, consolidations between Class I rail carriers since passage of the Staggers Act have not generated anticompetitive effects that would justify abandoning the Board's existing competition policies. To the contrary, those transactions have benefitted shippers by expanding the availability of efficient single-line service; improving service reliability and transit times by reducing the need to interchange long-haul shipments at multiple intermediate points; reducing operating costs and increasing carrier productivity (thereby enabling carriers to offer competitive rates); and preserving service over the lines of financially failing (or bankrupt) carriers. Every

single Class I rail merger approved by the Board or the ICC over the past 30 years has been subject to conditions that ensured that no shipper that had access to more than one railroad prior to the transaction was rendered captive to the merged carrier.

Perhaps the most persuasive evidence that consolidation of the rail industry in the post-Staggers era has not had harmful competitive effects can be found in the recent studies of competition in the rail industry discussed in Part II.A above. As those studies consistently showed, shippers today pay inflation-adjusted rates that are substantially lower than those that prevailed prior to 1980. (*See* pp. 13-17, *supra.*) Moreover, GAO's finding that the degree of shipper "captivity" to a single railroad decreased between 1994 and 2004 debunks the notion that the last wave of STB-approved consolidations in the 1990s significantly reduced the competitive options available to rail shippers. (*See* pp. 13-15, *supra*). Accordingly, the consolidation of Class I carriers since passage of the Staggers Act does not provide a basis for abandoning or modifying the Board's existing competition policies.

III. THE IMPROVED FINANCIAL HEALTH OF RAILROADS IS NOT A BASIS FOR IMPOSING BURDENSOME NEW REGULATIONS.

Some parties have suggested that the improved financial condition of the railroad industry in recent years provides a justification to alter the regulatory balance that Congress struck in the Staggers Act. Such arguments are utterly misguided. The primary purpose of the Staggers Act was "to allow for the restoration of the rail industry to vigorous and profitable growth." S. REP. NO. 96-470, at 6 (1979). The fact that Congress's policies have had the desired effect is no reason to abandon or change those policies now. To the contrary, imposing burdensome new regulations on railroads based on the (erroneous) premise that railroads have become "too profitable" would be especially harmful at a time when carriers will need to make

massive further investments in infrastructure to accommodate the projected increase in demand for rail service.

The 4R Act and the Staggers Act were prompted by Congress's grave concern about "the financial plight of the railroad industry." H.R. REP. NO. 96-1035, at 34 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3978, 3979. By the early 1970s, the United States railroad industry was experiencing a serious crisis. Most railroads were in financial distress, several major carriers had declared bankruptcy, and the federal government was forced to make a multi-billion dollar investment in Conrail to preserve freight service in the northeastern United States.[30] During the 1970s the rail industry's rate of return on net investment never exceeded 2.9 percent, and reached a low of 1.2 percent.[31] More than 20 percent of the nation's rail route mileage was being operated by railroads under bankruptcy protection. *See id.*

> [T]he financial status of the railroad industry before 1980 was poor and seemingly getting worse. . . . [T]he profitability of Class I railroads . . . was among the lowest of major industries. . . . The railroad industry also faced cash flow difficulties, marginal credit ratings, and concern within the financial community about its long-term viability. . . . Not only were railroads going bankrupt, but the condition of rail plant and equipment was poor.[32]

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[30] *See also MidAmerican Energy Co. v. STB*, 169 F.3d 1099, 1105 (8th Cir. 1999) (pre-Staggers regulatory approach "resulted in an industry chronically plagued by capital shortfalls and service inefficiencies").

[31] *See* Ass'n of Am. R.R., Comments, *The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, STB Ex Parte No. 658, at 4 (filed Oct. 12, 2005).

[32] U.S. GOV'T ACCOUNTING OFFICE, GAO/RCED-90-80, RAILROAD REGULATION: ECONOMIC AND FINANCIAL IMPACTS OF THE STAGGERS RAIL ACT OF 1980 10-11 (May 1990).

A contemporaneous Senate report observed that:

> many of the railroads are caught in a vicious cycle. Depressed earnings have robbed them of the ability to make improvements in plant which are needed to reduce cost and improve service. The inability to reduce costs and improve service eventually erodes the railroads' competitive position and adversely affects their net income—as the cycle is repeated.

S. REP. NO. 96-470, at 3 (1979). Congress concluded that, unless that cycle was broken, "[t]he industry's failure to achieve increased earnings will result in either further deterioration of the rail system or the need for additional Federal subsidy." H.R. CONF. REP. NO. 96-1430, at 79.[33]

Congress further found that "the significant reason for the decline in railroads' business has been the inflexibility of existing regulation." H.R. REP. NO. 96-1035, at 38; *see* H.R. CONF. REP. NO. 96-1430, at 79 ("[M]any of the Government regulations affecting railroads have become unnecessary and inefficient."). Congress decided that it was necessary to "significantly change railroad regulation so as to create a climate in which railroads can earn enough revenue to meet their capital needs." H.R. REP. NO. 96-1035, at 38. The Staggers Act promoted that objective by, *inter alia*, authorizing railroad-shipper contracts, imposing a quantitative market dominance limit on the ICC's rate reasonableness jurisdiction, and eliminating a host of unnecessary regulations.

The result was a remarkable rebirth of the rail industry. As a Department of Transportation witness testified at the Board's 2005 hearing on the effects of the Staggers Act:

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[33] *See also* S. REP. NO. 96-470, at 6 ("Almost all agree that something further must be done to improve the financial health of the nation's railroads or the industry will continue to falter with the likely alternative being only an increasingly heavy burden on the consumer and taxpayer. To the extent it remains desirable to continue private sector ownership of this nation's rail industry the need for this legislation is obvious and accepted.").

> [The Staggers Act] revitalized the railroad industry and by so doing benefitted shippers and consumers throughout the economy. 25 years ago this was an industry . . . marked by decline in all major respects. High rates, low returns on investment, eroding demand, low model traffic share and excess capacity. Of course, in 2005, all of these factors have been reversed. Average rates are down, return on investment is up, demand is robust, modal traffic share has increased and capacity is increasingly scarce. . . . [T]he dramatic overhaul of economic regulation brought about by the Staggers Act has been absolutely essential [to this turnaround]. . . . [C]ontinuation of the prior restrictive regulatory regime would likely have doomed the rail industry to a much reduced role in today's transportation sector.[34]

In short, the improved financial condition of the rail industry today is precisely the result that Congress sought to achieve in passing the Staggers Act. Calls for the Board to roll back the competitive policies of Staggers simply because railroads are financially better off than they were 30 years ago are ill-founded.

The assertion by some that the improvement in railroad financial health has been achieved at the expense of shippers is wrong. The *Christensen Report* examined that very issue, and concluded that the "increase in railroad rates experienced in recent years is the result of declining productivity growth and increased costs rather than the increased exercise of market power." *2009 Christensen Report* at ES-5 (emphasis added). As discussed above (at 13-17), other studies have reached the same conclusion.

CP's experience over the past decade supports the *Christensen Report's* conclusion that the increase in rail rates between 2004 and 2008 was directly related to market conditions, and is not indicative of any abuse of railroad market power. During the early years of the decade (2000-2004), CP's system-wide revenue per ton-mile actually declined, from 3.13 cents to

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[34] *The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, STB Ex Parte No. 658, Hr'g Tr. at 15-16 (Oct. 19, 2005) (testimony of U.S. DOT representative P. Smith) (emphasis added).

3.06 cents. A continuing decline in freight rates for commodities such as grain, sulphur and fertilizers, forest products and industrial/consumer products more than offset increases in rates for coal, automotive and intermodal traffic during those years. For the 2000 – 2004 period, CP experienced an overall gain of 12% in traffic volume and a corresponding increase of 9 percent in freight revenue. However, these gains were offset by a 11% increase in CP's operating expenses. Thus, during this period, CP's revenue growth was principally attributable to increasing traffic volume rather than higher rates.

CP's rates did begin to rise after 2004. However, that increase was driven by a sharp increase in expenses, most notably fuel. (Indeed, CP's fuel costs skyrocketed by 275 percent from 2004 to 2008.) Between 2004 and 2010, the growth in CP's revenue per ton-mile (25.5%) closely tracked the increase in CP's operating expenses (24.1%). During the recessionary year of 2009, CP's revenues and expenses both fell, principally as a result of declining traffic volume and a 38% drop in fuel prices. Traffic levels and associated revenues rebounded somewhat during 2010, with an accompanying increase in expenses. These trends reflect the normal functioning of the highly competitive transportation marketplace in which CP does business, and provide no support whatsoever for the notion that CP's pricing decisions result from an improper exercise of market power.

Thus, any suggestion that CP's improved financial health has come at the expense of its customers is demonstrably false. Rate increases implemented by CP over the past decade have been directly attributable to substantial increases in the demand for rail service and/or increases in input prices. CP's experience is fully consistent with, and supports, the conclusion of Christensen Associates, GAO and FRA that the increase in railroad rates in recent years is not the result of the exercise of market power.

There is no question that CP and other North American railroads are financially better off today than they were when the Staggers Act was promulgated. However, a healthier railroad industry should not be a cause for concern – much less a reason to reverse the deregulatory policies that helped the industry to survive, renew its infrastructure and deliver increasingly efficient service to shippers. To the contrary, the success of the policies set forth in the Staggers Act has made it possible for railroads to invest hundreds of billions of dollars in private capital not only to maintain their existing physical plant, but to expand capacity and to pursue innovations that benefit shippers, communities and other stakeholders. Indeed, the rail industry today re-invests a greater percentage of the revenue it earns than any other American business sector. During the next decade, CP and other rail carriers will face an enormous challenge to invest even greater sums in infrastructure and capacity in order to keep pace with the anticipated demand for rail service in North America. Any modification to the Board's regulatory policies that undermines the ability the railroad industry to make such investments will have a serious negative impact not only on carriers, but also on the ability of American businesses to compete successfully in the global economy.

IV. IMPOSING BURDENSOME NEW REGULATION WILL STIFLE RAIL INVESTMENT.

The Board instructed any party advocating changes to the current regulatory framework to address the potential impact that such changes could have "on the railroad industry, the shipper community, and the economy as a whole." *January 11 Notice* at 7. In particular, the Board correctly observed that "[a] loss of revenue could lead to less capital investment, constraining capacity and deteriorating service for future traffic." *Id.* The harmful impact that regulatory changes advocated by some shipper interests would have on railroads' ability to invest

in ongoing network maintenance and capacity improvements is a powerful independent reason to retain the current balanced approach to rail regulation.

Railroading is one of the most highly capital-intensive business requiring North America's rail industry to reinvest annually billions of dollars each year just to maintain the safety and efficiency of the existing rail network. Perhaps the most critical lesson learned during the pre-Staggers era was that excessive regulation artificially depresses railroad earnings, making it difficult for carriers to attract the capital they need to repair, renew and expand their physical plant. As GAO found, prior to 1980,

> Years of declining profits led to deferred maintenance of rights-of-way, and over time plant and equipment deteriorated. Prolonged deferrals in maintaining and replacing worn-out capital stock affected safety and the quality of rail service.[35]

While abandoning the policies embodied in the Staggers Act in favor of an "open access" regime might benefit one category of shippers in the short-term, such a shift in the Board's regulatory approach would produce harmful longer-term effects. As carriers earned less revenue, they would, over time, be forced to cut back expenditures to maintain and upgrade their tracks, locomotives and rolling stock, and other facilities. The stifling of infrastructure renewal will degrade service, discourage innovation for efficiency and safety and ultimately encumber future generations with massive investment necessary to upgrade an eroded rail system. A return to the economic conditions that produced the pre-Staggers cycle of decay in the rail industry is not in the best interest of any stakeholder – including "captive" shippers, who depend more than anyone else on the availability of reliable rail service.

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[35] U.S. GOV'T ACCOUNTING OFFICE, GAO/RCED-90-80, RAILROAD REGULATION: ECONOMIC AND FINANCIAL IMPACTS OF THE STAGGERS RAIL ACT OF 1980 10-11 (May 1990).

A. Substantial Investments Need To Be Made To Improve Capacity In The United States Rail Network.

The demand for freight rail service continues to grow, and it is universally accepted that rail capacity must be expanded substantially in the coming decades in order to meet that demand.[36] On a ton-mile basis, freight rail use has doubled and density has tripled since 1980.[37] Net ton-miles on Class I railroads grew by 51.5% between 1987 and 1999, and another 23.1% between 1999 and 2006. *See 2009 Christensen Report* at Vol. II, 16-8.

Given that increasing traffic volume, the freight rail network is already showing signs of constrained capacity. As GAO found in its report on freight transportation, "[s]ome railroad corridors between major markets do not have double tracked right-of-ways; adequate passing areas, intermodal yards, or switching facilities; or bridges or tunnels that can simultaneously accommodate multiple trains on different routes."[38] Congestion caused by lack of capacity at even a few key locations can have widespread impacts on service levels across the rail network.

Today's capacity concerns may be dwarfed in the future. FRA has projected that, between 2010 and 2035, freight carried by the U.S. transportation system will increase by another 22%.[39] Absent substantial additional investment, such a rate of growth will inevitably lead to significant capacity shortages. Indeed, FRA has found that projecting future volumes onto the existing rail network would leave many corridors operating over capacity.[40] The

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[36] U.S. GOV'T ACCOUNTABILITY OFFICE, FREIGHT TRANSPORTATION: NATIONAL POLICY AND STRATEGIES CAN HELP IMPROVE FREIGHT MOBILITY 10-11 (Jan. 2008).

[37] *See* Cambridge Systematics Inc., *National Rail Freight Infrastructure Capacity and Investment Study*, at 2-3 (Sept. 2007) ("*Cambridge Report*").

[38] U.S. GOV'T ACCOUNTABILITY OFFICE, FREIGHT TRANSPORTATION: NATIONAL POLICY AND STRATEGIES CAN HELP IMPROVE FREIGHT MOBILITY 12-13 (Jan. 2008).

[39] FED. RAIL ADMIN., NATIONAL RAIL PLAN PROGRESS REPORT 6 (Sept. 2010).

[40] FED. RAIL ADMIN., PRELIMINARY NATIONAL RAIL PLAN 5 (Oct. 2009).

Cambridge Report found that in 2035, 30% of primary rail corridors will be operating above capacity and another 25% will be operating at or near capacity.[41] Such congestion on the rail network could have serious negative economic effects.

Class I carriers have already begun to invest massive amounts of capital to meet this challenge. Between 1996 and 2007, the rail industry invested 17% of total revenues in capital investments, compared to just 3% for the U.S. manufacturing sector.[42] According to FRA, industry "investment to expand capacity rose from $6.4 billion in 2005 to $10.2 billion in 2008."[43] After a slight dip to $9.9 billion in the recessionary year 2009, railroad capital investments reached an all-time high of $10.7 billion in 2010.[44] Total rail industry capital investment is projected to increase to $12 billion in 2011.[45]

Studies suggest that up to $148 billion in additional capital will need to be invested in the U.S. rail system to meet the anticipated future demand for rail transportation.[46] It is reasonable to expect that freight railroads themselves – not governmental entities – will be required to bear the lion's share of responsibility for capacity improvements, particularly given the current

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[41] *Cambridge Report*, at 5-6.

[42] *Cambridge Report*, at 4-12; Christensen Associates, *Analysis of Competition, Capacity and Service Quality*, Vol. II, 16-4 (Nov. 2009).

[43] FED. RAIL ADMIN., PRELIMINARY NATIONAL RAIL PLAN 18 (Oct. 2009). In 2006, Class I railroads spent $8.5 billion on capital expenditures. $1.5 billion (18%) was on equipment and the remainder was roadway and structures. *Cambridge Report*, at 4-11 – 4-12. In 2007, $1.9 billion was estimated to be spent on expansion of capacity through the construction of new roadway and structures, the highest level in recent years. *Cambridge Report*, at 4-12.

[44] *See* Ass'n of Am. R.R., *Great Expectations 2011: Freight Rail's Role in U.S. Economic Recovery*, at 8, *available at* http://www.aar.org/~/media/aar/GreatExpectations/GreatExpectations2011_Final.ashx.

[45] *See id.*

[46] RAND, *The State of U.S. Railroads*, at 42 (2008); Am. Soc'y of Civil Engineers, *Policy Statement 521 – Rail Infrastructure Investment, available at* http://www.asce.org/Content.aspx?id=8598.

governmental budgetary environment. Indeed, it is estimated that Class I carriers will be called upon to provide approximately $135 billion of the required capital, including $94.75 billion for line haul expansion including mainline track upgrades and new signal control systems; $19.4 billion for bridges, tunnels, and clearances; $9.32 billion for intermodal terminal expansion; and billions more for other capital needs.[47] Based on current projections, this will require the nation's railroads to invest approximately $5.3 billion annually.[48]

In short, expansion of the nation's rail network has been, and must continue to be, funded in large part by rail carriers. If the rail industry cannot justify such investment, or is unable to attract the capital to pay for it, the anticipated surge in freight traffic will have to be handled via other modes of transportation. Shifting massive additional volumes of freight to motor carriage will increase congestion on the nation's highways, threaten motorist safety and generate emissions that harm the environment. If government cannot (or will not) pay for a major expansion of the highway network to accommodate growing freight volumes, American industries may miss out on opportunities to compete for business in the global economy. While some shippers might believe that the Board should reshape the regulatory landscape to serve their parochial desire to pay lower rail rates, that shortsighted approach would inevitably harm everyone who depends upon a safe and efficient transportation system, including "captive" shippers themselves.

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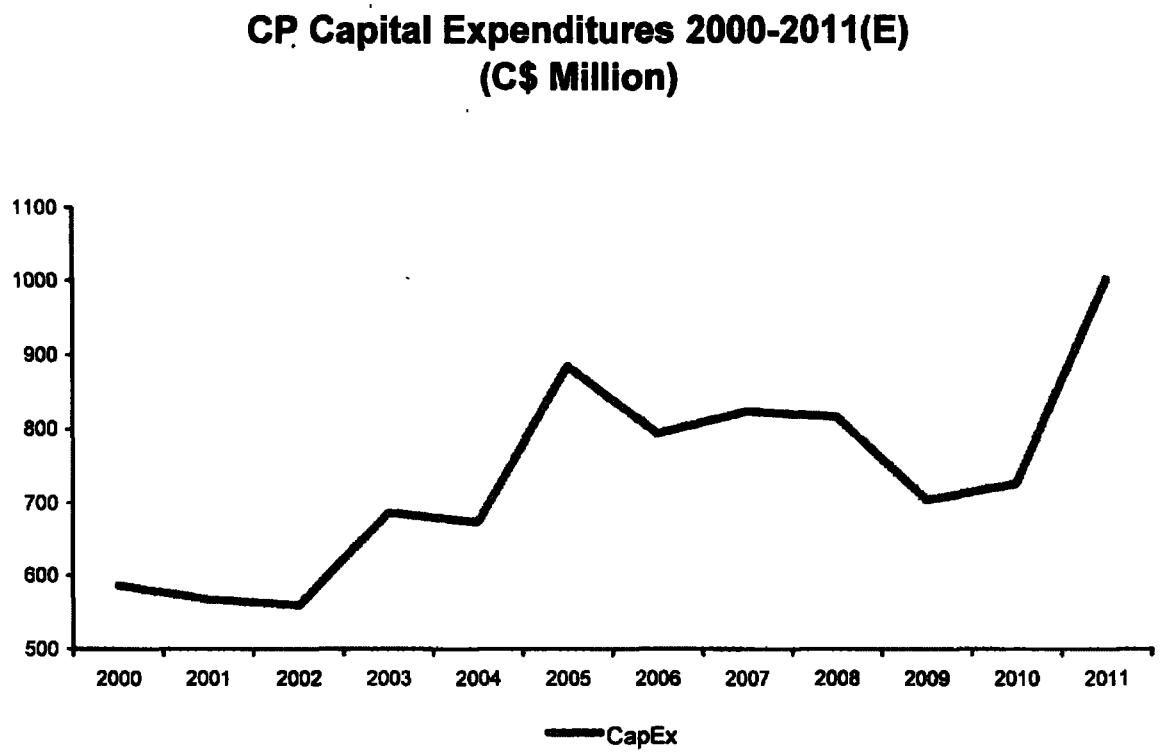
[47] *Cambridge Report*, at 7-2.

[48] If market share for freight rail were to rise by 5 percent, another $400 million could be needed annually. *See* The Nat'l Surface Transp. Policy and Revenue Study Comm'n, *Transportation for Tomorrow*, Vol. II, pp. 4-17 (Dec. 2007).

B. CP Is Making Substantial Capital Investments To Improve Service And Capacity.

As Figure 1 shows, CP's capital expenditures have increased substantially over the last decade. During 2000-2004, capital expenses averaged slightly more than $600 million annually.[49] Between 2005 and 2010, CP's annual capital investment grew to almost $800 million. Between 2007 and 2010, CP invested more than three billion dollars for capital improvements to its network and facilities.[50]

FIGURE 1



[49] All dollar figures set forth in this Part IV.B. are expressed in Canadian dollars.

[50] *See* Canadian Pacific, Fourth Quarter 2010 Earnings Review, at 19 (Jan. 26, 2011), *available at* http://www8.cpr.ca/cms/English/Investors/Earnings/default.htm (follow "Presentation Slides" link).

In 2010 alone, CP spent more than $726 million for capital programs, including the installation of 416 track miles of rail and 872,000 crossties.[51] Even in a recessionary environment, CP invested more than one out of every seven revenue dollars on capital expenditures.[52] That ratio is projected to increase in future years – CP expects to invest, on average, between 16% and 18% of revenues in capital expenditures. The intensity of CP's capital spending on a per-ton-mile basis has also increased, with capital spending increasing from $5.4 million-per-billion-ton-miles in 2000-2004 to $6.4 million-per-billion-ton-miles in 2005-2010.

CP recently announced a 2011 capital spending plan that is is expected to be in the range of $950 million to $1.05 billion.[53] These expenditures are designed to "improv[e] service reliability, asset velocity, and productivity."[54] CP is executing a multi-year plan to increase siding capacity to accommodate long trains and improve network fluidity, and to implement information technology enhancements to improve shipment visibility and information needs. *See id.* at 3, 27. CP's 2011 capital plan includes approximately $680 million for track infrastructure renewal and $200 million for volume growth, productivity initiatives, and strategic network enhancements. *Id.* at 27.

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[51] *See* Canadian Pacific, Annual Report 2010, at 27, *available at* http://www8.cpr.ca/english/investors/financial/annual+report.htm.

[52] *See id.* at 4 (2010 revenues of $4,981.5 billion); *id.* at 27 (2010 capital expenditures of $726 million).

[53] *See id.* at 27.

[54] *See* Canadian Pacific, *Canadian Pacific announces 2011 capital plan focused on service, productivity, technology and growth* (Jan. 12, 2011), *available at* http://www8.cpr.ca/cms/English/Media/News/General/2010/Canadian+Pacific+announces+2011+capital+plan.htm ("Our first priority is to re-invest in the business keeping our core franchise safe and well maintained.").

CP's capital investments have been targeted to meet current and projected customer demand. For example, in 2006, CP completed an expansion of its main lines in Western Canada to increase capacity and fluidity, at a cost of $160 million. This project, which included 50 miles of new track, 300,000 tons of ballast, and 140,000 new cross ties, yielded a 12 percent capacity increase in that critical corridor (which is used, among other things, to handle U.S. grain exports). Following the acquisition of DM&E in 2008, CP invested approximately $155 million during 2009-2010 to install 150 miles of rail, 190,000 tons of ballast and 130,000 cross ties on DM&E's lines, in order to improve the safety and fluidity of DM&E train operations. More recently, CP announced a $100 million investment program to increase network capacity and improve service on its lines in North Dakota.[55] This investment will help CP meet anticipated needs including increased grain traffic, expanded development of oil in the Bakken Formation, and continued growth in ethanol production. Over the past 11 years, CP has also added 450 new units to its locomotive fleet. While these investments will help CP to provide safe, efficient and reliable service in the coming years, further investment will clearly be necessary to meet the challenge presented by longer-term growth in demand for rail service.

The investments that railroads need to make in the coming decade will not be limited to track and rolling stock. Although railroading is an "old" business, the complexity of today's rail operations, and customer demands for greater shipment visibility and more self-service shipment tools, require carriers to invest substantial sums in information technology. CP serves approximately 6,000 customers who ship goods between 20,000 distinct origin-destination pairs. In order to meet their requirements, CP must handle approximately 11,000 new carloads of

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[55] *See* Canadian Pacific, *CP invests in North Dakota, expanding capabilities and resources* (Mar. 25, 2011), *available at* http://www8.cpr.ca/cms/English/Media/News/General/2010/cp+invests+in+north+dakota.htm.

traffic every day over its 15,000-mile network. CP conducts train operations 24 hours per day, 7 days per week, pursuant to an operating plan that involves approximately 1,000 locomotives, 50,000 rail cars and 5,000 train crew members. Managing such highly complex operations, and providing customers the shipment support they need, requires increasingly sophisticated information technologies and processes. Carriers must also invest in communications and back office systems capable of managing the massive amounts of data generated by those operations. The anticipated growth in rail traffic will require CP and other carriers to make even greater investments in technology solutions that enable them to meet their customers' needs safely and efficiently. This technology spend is over and above the spend required by PTC regulation.

Equally important is the investment that railroads will make in human assets. Productivity improvements, operational changes and the introduction of new materials and technologies in prior decades were accompanied by a decline in railroad employment levels. However, this trend has begun to reverse in recent years. As opportunities for substantial productivity gains are exhausted and the railroad industry work force continues to age, CP and other Class I railroads have increased their hiring. Overall railroad industry employment at the end of 2010 increased by 5.2 percent over 2009.[56]

CP's hiring has increased dramatically in recent years, particularly for qualified employees in the running trades (conductors and engineers). CP's total union hires averaged 700 per year (270 in the U.S.) during 2000-2004, and rose to 1,070 (330 in the U.S.) annually between 2005 and 2010. Running trades hires during that period averaged 320 between 2000 and 2004 and increased to 430 per year between 2005 and 2010. In the United States, running

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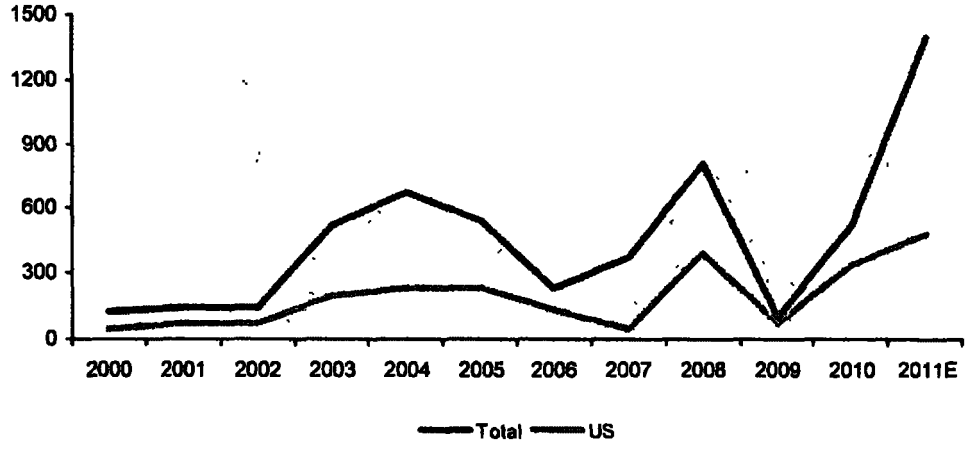
[56] *See* Ass'n of Am. R.R., *Great Expectations 2011: Freight Rail's Role in U.S. Economic Recovery*, supra note 44, at 5.

trades hires averaged 120 per year between 2000 and 2004 and increased to 180 per year between 2005 and 2010. As demonstrated in Figure 2, hiring growth in both the United States and Canada is expected to accelerate. In 2011, CP expects to make 1,400 running trades hires, of which 480 will be positions created in the United States.

FIGURE 2

CP Train and Engine Crew Hires
2000-2011(E)



Major regulatory changes could prevent CP and other railroads from earning the revenues necessary to make needed investments in infrastructure, personnel and cutting-edge information technology. Indeed, even the threat of burdensome new regulation is likely to chill such investment. Capital investment requires confidence by CP and other carriers, as well as their shareholders, that such expenditures make economic sense:

> [Carrier] investment projections assume that the market will support rail freight prices sufficient to sustain long-term capital investments. If regulatory changes or unfunded legislative mandates reduce railroad earnings and productivity, investment and capacity expansion will be slower and the freight railroads will be less able to meet the U.S. DOT's forecast demand.[57]

The prospect of significant changes in the regulatory environment will create a strong disincentive for carriers to undertake major capital projects. As GAO observed,

> Rail investment involves private companies taking a substantial risk which becomes a fixed cost on their balance sheets, one on which they are accountable to stockholders and for which they must make capital charges year in and year out for the life of the investment. A railroad contemplating such an investment must be confident that the market demand for that infrastructure will hold up for 30 to 50 years.[58]

The FRA has similarly warned against regulatory measures that would have the effect of reducing rail revenues, finding that "[f]reight rail infrastructure maintenance and capacity enhancements . . . can only occur with Federal legislation and policies that allow rail carriers to earn revenues that are sufficient to encourage their continued investment in the system."[59]

The Board need not speculate about the potential deleterious effects of abandoning differential pricing for the sake of enabling demand-inelastic shippers to pay rates similar to those paid by shippers with more competitive options. History shows the result – just as in the pre-Staggers era, a re-regulatory approach will lead to reduced rail revenues, less investment in maintenance and capacity, a degrading rail network, the loss of business from shippers who have competitive options, and a threat to the long-term financial health of the rail industry. As the

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[57] *Cambridge Report*, at ES-2.

[58] U.S. GOV'T ACCOUNTABILITY OFFICE, FREIGHT RAILROADS: INDUSTRY HEALTH HAS IMPROVED, BUT CONCERNS ABOUT COMPETITION AND CAPACITY SHOULD BE ADDRESSED 56 (Oct. 2006).

[59] FEDERAL RAILROAD ADMINISTRATION, PRELIMINARY NATIONAL RAIL PLAN: 4 (Oct. 2009).

2009 Christensen Report recognized (at ES-39), "there is little room to provide significant 'rate relief' to certain groups of shippers without requiring increases in rates for other shippers or threatening the railroads' financial viability." The Board should heed that warning, and reject self-serving demands for wholesale regulatory changes that could impair the vitality of a rail network that American business will increasingly rely upon to support the nation's future economic growth.

V. RESPONSE TO SPECIFIC STB ISSUES

A. Competitive Access

The competitive access rules governing reciprocal switching and terminal trackage rights follow directly from the ICC's interpretation of the Staggers Act. In *Intramodal Rail Competition*, 1 I.C.C. 2d 822 (1985), the ICC adopted the regulations that continue to govern competitive access complaints today. *See id.* at 839-43; 49 C.F.R. Part 1144. Significantly, the Commission made clear that it would only prescribe reciprocal switching if "the prescription is necessary to remedy or to prevent an act contrary to the competition policies of section 11101a, or is otherwise anticompetitive." *Id.* at 830. The Part 1144 regulations were upheld on appeal. *See Baltimore Gas & Electric Co. v. United States*, 817 F.2d 108 (D.C. Cir. 1987). That interpretation was subsequently ratified by Congress in ICCTA, and the Board does not have authority to change it.

The ICC first applied its competitive access regulations in *Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 1 I.C.C. 2d 362 (1985) ("*Midtec I*"), *reconsidered*, 3 I.C.C. 2d 171 (1986) ("*Midtec II*"), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (1988). Midtec, which operated a paper mill at Kimberly, Wisconsin, was served by a single railroad, CNW. Midtec sought an ICC order authorizing a competing rail carrier to serve its facility via compelled terminal trackage rights and/or prescribed reciprocal switching. Consistent with

Intramodal Rail Competition, the ICC held that it would impose access by another railroad only if Midtec could show that the railroad serving it "has engaged in or is likely to engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive." *Midtec II*, 3 I.C.C. 2d at 181. The "essential questions" were (1) "whether the railroad has used its market power to extract unreasonable terms" on the movements at issue; or (2) "whether because of its monopoly position it has shown a disregard for the shipper's needs by rendering inadequate service." *Id.*; *see Midtec Paper Corp. v. United States*, 857 F.2d at 1503. Applying those standards, the ICC found no evidence that Midtec had suffered from any competitive abuse, including inadequate service or excessive prices.

The *Midtec* decision squarely rejected the notion that the agency should grant shippers access to multiple rail carriers as a matter of course. Midtec argued that the Board should grant relief regardless of whether it could present evidence of competitive abuse, simply because it would "benefit from the mandatory addition of a second railroad." 3 I.C.C. 2d at 174. The ICC rejected that argument, saying "we think it correct to view the Staggers [Act] changes as directed to situations where some competitive failure occurs." *Id.* The ICC added that there is a "vast difference between using the Commission's regulatory power to correct abuses that result from insufficient intramodal competition and using that power to initiate an open-ended restructuring of service to and within terminal areas solely to introduce additional carrier service."

1. Congress's Ratification of the ICC's Competitive Access Regulations in ICCTA.

By 1986, the ICC had clearly held that, under the Staggers Act, competitive access can only be imposed in "situations where some competitive failure occurs," and that the ICC would not force such access in the absence of evidence that a railroad was abusing market power. *Midtec II*, 3 I.C.C. 2d at 174. Congress's decision to re-enact the competitive access provisions

of the Interstate Commerce Act in 1995 without modification effectively ratified the ICC's *Midtec* approach.

Reports to Congress, hearings, and committee reports all show that Congress explicitly considered the ICC's competitive access rules – including proposals to expand or eliminate those rules – before choosing to continue the ICC's "existing standards." H. REP. NO. 104-311, at 84, *reprinted in*.1995 U.S.C.C.A.N. 793, 796. This "ratification" of the ICC's interpretation of the Staggers Act provisions can be reversed only by Congress. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." [60] On October 25, 1994 – just over a year before ICCTA was enacted – the ICC submitted to Congress a comprehensive report regarding the ICC's interpretation of its regulatory responsibilities.[61] Among other things, the *ICC Regulatory Responsibilities Study* discussed the statutory framework for competitive access remedies and the ICC's interpretation of the appropriate scope of those remedies. *See id.* at *25-26. The ICC stated unequivocally that "[it] will force such arrangements only where necessary to redress anticompetitive actions." *Id.* at *25 & n.152 (citing *Midtec*). The *ICC Regulatory Responsibilities Study* emphasized that "regulatory intervention is now properly limited to those situations in which it is necessary to address a carrier's anticompetitive actions." Moreover, the ICC observed that it was important for competitive access remedies to be "used cautiously," in

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[60] *Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 783 n.15 (1985); *see, e.g., Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986) ("When the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" (quoting *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974)); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1964).

[61] *See* Interstate Commerce Commission, *Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994* (Oct. 25, 1994), *available at* 1994 WL 639996 ("*ICC Regulatory Responsibilities Study*").

part because "requiring railroads to make their tracks available to competitors undermines the incentive carriers have to invest in their facilities." *Id.* at *26 (emphasis added). The *ICC Regulatory Responsibilities Study* gave Congress clear notice of the ICC's *Midtec* decision, as well as the agency's determination that competitive access remedies should be available only "to address a carrier's anticompetitive actions."

During the consideration of ICCTA, Congress held hearings at which witnesses specifically asked Congress to change the ICC's reciprocal switching and terminal access rules.[62] Witnesses at that hearing argued that Congress should make it easier for shippers to obtain agency-mandated reciprocal switching or terminal access. For example, the Chemical Manufacturers Association argued that "[a]ny new legislation must encourage greater rail-to-rail competition than currently exists. All shippers must have the right of access to two or more railroads at reasonable rates and service." *Id.* at 534 (emphasis added). U.S. Clay Producers similarly advocated "statutory requirements and procedures for competitive access through switching, trackage rights, or otherwise, so that shippers served by only one Class I railroad are assured of access to other Class I railroads with reasonable rates and routes." *Id.* at 493-94 (emphasis added); *see id.* at 496 ("A prompt and effective approach must be provided in the statute so that all shippers are permitted access to more than one Class I rail carrier upon reasonable request.") (emphasis added).[63] In contrast to those shippers, the Department of Transportation recommended "no change" to current rules under which the agency "can order

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[62] *See Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearing Before the Subcomm. on Railroads of the H. Comm. on Transportation*, 104th Cong. (Jan. 26 & Feb. 22, 1995) (hereafter "*ICC Authority Hearings*").

[63] *See also ICC Authority Hearings* at 192-93 (testimony of R. Granatelli on behalf of Society of Plastics); *id.* at 281-82, 291 (Society of Plastics statement urging legislation to promote competitive access for shippers served by one railroad).

access under certain conditions" and "on a very limited basis." *Id.* at 17-18 (testimony of J. Canny, Deputy Assistant Secretary of Policy, U.S. Department of Transportation).[64]

The Congress that enacted ICCTA was fully aware that shippers wanted it to alter the ICC's competitive access rules to give "[a]ll shippers . . . the right of access to two or more railroads at reasonable rates and service." *Id. at 534.* And Congress was also aware that USDOT believed that the sounder policy was to adhere to the *Midtec* approach. Congress chose to follow USDOT's recommendation and enacted ICCTA without changing "existing standards" for reciprocal switching and terminal access. H. REP. NO. 104-311, at 84, *reprinted in* 1995 U.S.C.C.A.N. 793, 796 (ICC functions including "terminal trackage rights and reciprocal switching jurisdiction" would be "transferred . . . under existing standards with minor modifications for large Class I railroads' transactions").[65] In doing so, Congress made clear that it approved of – and did not intend to alter – the ICC's post-Staggers approach to economic regulation, including its policies governing market access:

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[64] *See also id.* at 221 (DOT written statement arguing that "competitive access authority should be retained in its current form" and that such authority "must be exercised judiciously").

[65] *See also id.* at 105, 1995 U.S.C.C.A.N. at 816 (ICCTA "retains the existing agency power to order access to terminal facilities"); H. CONF. REP. NO. 104-422, at 183-84, *reprinted in* 1995 U.S.C.C.A.N. 850, 868-69 ("Under the amended section 11102, the agency's existing power to order access to terminal facilities, including main-line tracks a reasonable distance from the terminal, would be retained.").

> Beyond weeding out outdated and unnecessary provisions, the bill generally does not attempt to substantively redesign rail regulation. Rather, it would preserve the careful balance put in place by the 4R Act and the Staggers Act that led to a dramatic revitalization of the rail industry while protecting significant shipper and national interests.
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> * * *
>
> The Committee recognizes that certain affected shipper groups – most notably smaller shippers and smaller railroads – believe that further legislative changes are necessary or desirable to more fully protect their interests. However, the Committee is concerned that such additional measures would necessarily cast an overly broad regulatory net and even then might be ineffective to solve the underlying concerns (e.g. car supply, market access, etc.).
>
> S. REP. 104-176, at 6, 9-10 (1995) (emphasis added).

In short, there can be no question that, when it passed ICCTA, Congress was well aware of (1) the *Midtec* decision; (2) the ICC's interpretation of its competitive access authority; and (3) the fact that some shippers believed that the policies embodied in *Midtec* should be modified or reversed. With that knowledge, Congress chose to re-adopt the competitive access provisions of the ICA without altering the ICC's interpretation. That action manifested a clear intent to ratify the *Midtec* approach to regulating market access, and as a result that approach cannot be revised unless and until Congress authorizes it to be changed. *Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 783 n.15 (1985).

2. Congress's Repeated Rejection Of Legislation That Would Alter Midtec Is Further Evidence That Congress Has Ratified The Agency's Interpretations.

Further evidence that Congress approves of the Board's current competition policies is the fact that, in the post-ICCTA era alone, at least sixteen bills have been introduced in the House or Senate that would have altered the *Midtec* standards by relaxing the evidentiary

standard for obtaining forced reciprocal switching or terminal access.[66] None of those bills was passed by even one house of Congress.

Courts have inferred congressional acquiescence in an agency's interpretation of a statute where Congress has repeatedly failed to act on legislation specifically aimed at reversing that interpretation. *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983). In *Bob Jones*, over a twelve-year period thirteen bills were introduced to overturn an IRS statutory interpretation. The Court found Congress's failure to enact any of those bills to be "significant" evidence that Congress approved of the IRS's interpretation. *Id.* at 600-01; *see Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 170 n.5 (2001) (noting that *Bob Jones* presented "overwhelming evidence of acquiescence"). But as substantial as the evidence of Congressional ratification was in *Bob Jones*, it is even more overwhelming here. Congress has rejected sixteen bills seeking to overturn this agency's competitive access regulations – three more than in *Bob Jones*. More importantly, Congress failed to act even where it was directly engaged in a fundamental review of the agency's regulatory powers in enacting ICCTA. Indeed, Congress explicitly stated that it wished to "preserve the careful balance put in

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[66] *See* Surface Transportation Board Reauthorization Act of 2009, S. 2889, § 303 (2009); Railroad Competition and Service Improvement Act of 2007, S. 953, 110th Cong., § 104 (2007); Railroad Competition and Service Improvement Act of 2007, H.R. 2125, 110th Cong., § 104 (2007); Railroad Competition Improvement and Reauthorization Act of 2005, H.R. 2047, 109th Cong., § 5; Railroad Competition Act of 2006, S. 2921, 109th Cong., § 104 (2006); Railroad Competition Act of 2005, S. 919, 109th Cong., § 102 (2005); Railroad Competition Act of 2003, H.R. 2924, 108th Cong., § 5 (2003); Railroad Competition Act of 2003, S. 919, 108th Cong., § 5 (2003); Surface Transportation Board Reform Act of 2003, H.R. 2192, 108th Cong., § 104 (2003); Railroad Competition Act of 2001, S. 1103, 107th Cong., § 103 (2001); Surface Transportation Board Reform Act of 2001, H.R. 141, 107th Cong., § 104 (2001); Railroad Competition and Service Improvement Act of 1999, H.R. 2784, 106th Cong., § 7 (1999); Railroad Competition and Service Improvement Act of 1999, S. 621, 106th Cong., § 7 (1999); Surface Transportation Board Reauthorization Act of 1999, H.R. 3163, 106th Cong., § 6 (1999); Surface Transportation Board Reform Act of 1999, H.R. 3446, 106th Cong., § 104 (1999); Surface Transportation Board Modernization Act, H.R. 3398, 106th Cong., § 12 (1999).

place by the 4R Act and the Staggers Act." S. REP. 104-176, at 6 (1995) (emphasis added). Congress's repeated rejection of legislative proposals to overturn the Board's competitive access policies is powerful evidence that it approves of those policies.[67]

B. Bottleneck Rates

While some shippers have criticized the Board's *Bottleneck* decisions,[68] those parties fail to recognize that those rulings are grounded upon the Board's interpretation of the Interstate Commerce Act – not policy choices that the Board can change of its own volition. As the Board explained, its *Bottleneck* decisions were "mandated by the law," *Bottleneck I*, 1 S.T.B. at 1073 n.21. In particular, the *Bottleneck* decisions were based upon provisions of the Staggers Act that preserve a railroad's routing discretion and right not to be short-hauled (*see* 49 U.S.C. § 10705), as well as controlling Supreme Court precedent (see *Great Northern Ry. Co. v. Sullivan*, 294 U.S. 458, 463 (1935)). Even if it were wise to do so – and, for the reasons discussed above, it is not – the Board does not have the legal authority to rewrite the statute or to reverse well-established Supreme Court precedent.

Moreover, the Supreme Court's venerable *Great Northern* holding that a shipper may not challenge only a portion of a through rate – a precedent that precludes any argument that

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[67] *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) ("refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it"); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 313 (1933) ("Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years."); *Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932) ("The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight").

[68] *Cent. Power & Light Co. v. Southern Pac. Transp. Co.*, 1 S.T.B. 1059 (1996) ("*Bottleneck I*"), *clarified by* 2 S.T.B. 235 (1997) ("*Bottleneck II*").

shippers should be allowed to separately challenge the "bottleneck" portion of a joint rate – has been approved by Congress. The *Great Northern* principle (which in fact dates from *Louisville & No. R.R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 234 (1925)) is well-established law that was reaffirmed on multiple occasions long before Congress enacted the Staggers Act and ICCTA.[69] Congress was certainly aware of those precedents, and its decision to leave the Supreme Court's interpretation in place even as it enacted comprehensive revisions to the Interstate Commerce Act in 1980 and again in 1995 demonstrates that Congress approves of the Supreme Court's interpretation. *See Herman & Maclean v. Huddleston*, 459 U.S. 375, 385-86 (1983); *Canada Packers, Ltd. v. Atchison, Topeka & Santa Fe Ry. Co* , 385 U.S. 182, 184 (1966) (holding that fact that "Congress, which could easily change the rule, has not yet seen fit to intervene" was evidence supporting ICC's "long-standing construction of the statute").

As with *Midtec*, Congress has repeatedly rejected proposals to overturn the *Bottleneck* decisions legislatively. Since 1998, sixteen bills have been introduced that would have

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[69] *See, e.g., United States v. ICC*, 198 F.2d 958, 974 (D.C. Cir. 1952) ("[*Great Northern*] held that the shipper could not complain of the division of the charges among the participating carriers, and . . . remarked that '[t]he shipper's only interest is that the charge shall be reasonable as a whole") *Metropolitan Edison v. Conrail*, 5 I.C.C.2d 385, 408 (1989) ("The Supreme Court's conclusions in *L&N* and *Great Northern* continue to have vitality after the Staggers Act"); *see also Union Pac. R.R. Co. v. STB*, 202 F.3d 337, 339 (D.C. Cir. 2000) ("It has been a venerable principle of railroad rate regulation that the reasonableness of a rate is to be assessed on a 'through basis' – that is to say, a shipper may challenge only the rate of the origin-to-destination route as a whole, rather than the reasonableness of rates charged for a particular segment of the route."); *Western Resource, Inc. v. STB*, 109 F.3d 782, 789 (D.C. Cir. 1997) ("Shippers . . . if charged either a joint or proportional rate, must challenge the rate for the entire through movement; they cannot challenge individual segments"); *Major Rail Consolidation Procedures*, 5 S.T.B. 539, 564 (2000) ("It is now well settled that, absent a transportation contract to a junction, our statutory scheme does not permit shippers to challenge segments of joint or through rates.").

overturned the *Bottleneck* decisions.[70] However, not one of those bills passed in either house of Congress. Congress's failure to enact this legislation is further evidence that it approves of the Board's interpretation of the statute. *See Bob Jones*, 461 U.S. at 600.

VI. CONCLUSION

The regulatory policies embodied in the Staggers Act mandate a measured approach to government intervention that has greatly benefited both railroads and their customers. The increasingly global transportation marketplace in which CP and other railroads do business today is subject to even greater competitive forces than it was when Congress enacted the Staggers Act. There is no legitimate reason for the Board to "revisit" its competition-related policy decisions, which properly reflect the regulatory balance struck by Congress. The Board's current competitive access and *Bottleneck* rules, in conjunction with its recent initiatives to make the rate case process less cumbersome and expensive, afford shippers adequate remedies in those limited

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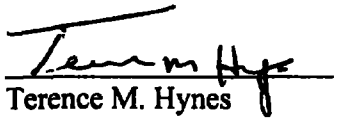
[70] *See* Surface Transportation Board Reauthorization Act of 2009, S. 2889, § 302 (2009); Railroad Competition and Service Improvement Act of 2007, S. 953, 110th Cong., § 102 (2007); Railroad Competition and Service Improvement Act of 2007, H.R. 2125, 110th Cong., § 102 (2007); Railroad Competition Improvement and Reauthorization Act of 2005, H.R. 2047, 109th Cong., § 3; Railroad Competition Act of 2006, S. 2921, 109th Cong., § 102 (2006); Railroad Competition Act of 2005, S. 919, 109th Cong., § 102 (2005); Railroad Competition Act of 2003, H.R. 2924, 108th Cong., § 6 (2003); Railroad Competition Act of 2003, S. 919, 108th Cong., § 6 (2003); Surface Transportation Board Reform Act of 2003, H.R. 2192, 108th Cong., § 102 (2003); Railroad Competition Act of 2001, S. 1103, 107th Cong., § 101 (2001); Surface Transportation Board Reform Act of 2001, H.R. 141, 107th Cong., § 102 (2001); Railroad Competition and Service Improvement Act of 1999, H.R. 2784, 106th Cong., § 5 (1999); Railroad Competition and Service Improvement Act of 1999, S. 621, 106th Cong., § 5 (1999); Surface Transportation Board Reform Act of 1999, H.R. 3446, 106th Cong., § 102 (1999); Surface Transportation Board Modernization Act, H.R. 3398, 106th Cong., § 10 (1999); Surface Transportation Board Amendments of 1998, S. 2164, 105th Cong., § 8 (1998); Railroad Shipper Protection Act of 1997, S. 1429, 105th Cong., § 6 (1997).

instances in which regulatory intervention may be appropriate. Accordingly, CP urges the Board to retain its current competition-related policies, and to discontinue this proceeding.

Respectfully submitted,



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Dated: April 12, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Initial Comments of Canadian Pacific Railway Company to be served by first class mail, postage prepaid, this 12th day of April 2011, to all parties of record.

Terence M. Hynes